

***United States Court of Appeals
for the Second Circuit***



**INTERVENOR'S
BRIEF**

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

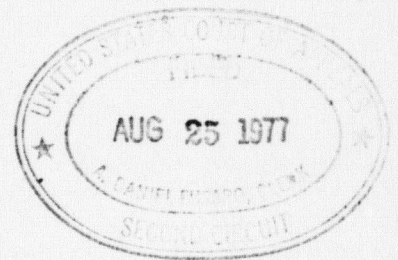
UNITED STATES OF AMERICA, PLAINTIFF;
SOUTH END EDUCATION COMMITTEE, ET AL,
INTERVENING PLAINTIFFS;

AND

BARNARD SCHOOL PTA, INC.,
INTERVENING APPELLEES

VS.

BOARD OF EDUCATION OF WATERBURY,
CONNECTICUT, ET AL,
DEFENDANTS.



DEFENDANTS' APPEAL FROM UNITED STATES
DISTRICT COURT, DISTRICT OF CONNECTICUT,
ORDER DATE JUNE 10, 1977 APPROVING
MAGISTRATE'S REPORT ON REMEDIAL PLANS
AND ORDERING DEFENDANTS TO IMPLEMENT
"AMICUS PLAN C" PROPOSED BY BARNARD
SCHOOL P. T. A., INC., AS AMICUS CURIAE

BRIEF FOR THE INTERVENING APPELLEE
BARNARD SCHOOL P. T. A., INC.

Joseph D. Garrison
Jonathan E. Silbert
405 Orange Street
New Haven, Connecticut
06511

TABLE OF CONTENTS

	PAGE
Statement of the Issues	1
Statement of the Case	2
Argument	11
Conclusion	17
Table of Authorities	18

STATEMENT OF THE ISSUES

- I. BECAUSE THE DEFENDANTS ENTERED INTO A CONSENT ORDER WHICH RENDERED UNNECESSARY A CONSIDERATION OF THE ISSUE OF THE DEFENDANTS' PURPOSE AND INTENT TO DISCRIMINATE, THE COURT PROPERLY DID NOT DECIDE THAT ISSUE IN EVALUATING THE DEFENDANTS' PROPOSED DESEGREGATION PLAN.
- II. THE COURT DID NOT ERK IN ORDERING THE IMPLEMENTATION OF AMICUS PLAN C.

STATEMENT OF THE CASE

On October 13, 1969, the United States Government sued the Board of Education of Waterbury, Connecticut, the individual members of the Board, the Superintendent of Schools, the City of Waterbury itself and its Mayor in a desegregation case pursuant to 42 U.S.C. 2000c-6 and 28 U.S.C. 1345. The Government's complaint alleged that by their policies and practices the defendants had denied Black and Hispanic students in the Waterbury School System equal protection of the laws and that they had refused to take reasonable steps to correct the situation. The plaintiff sought an injunction enjoining the defendants from failing to afford equal educational opportunities to all students regardless of race and from failing to take affirmative steps to eliminate unconstitutional segregation of the elementary schools in the Waterbury School System.

Although they denied the substantive allegations of the Government's complaint and asserted that the concentration of minority group students in particular elementary schools was a result of residential and neighborhood patterns and not of their policies or practices, the defendants also undertook a number of measures designed to alter the student assignment patterns and to insure the provision of equal educational opportunities to non-English-speaking students. Such positive steps included the closing of schools with the highest concentration of Black and

Hispanic students, the establishment of the Follow-Through Program, the implementation of Project: Concern, implementation of a middle-school construction program and the development of a Bi-Lingual Program.

By June of 1973, there was a consensus among the parties that the City of Waterbury was moving toward effective desegregation of its public school system. Crucial to this agreement was demonstrated progress on a three stage school construction program to establish three middle-school complexes. In a Consent Order dated June 7, 1973, the parties acknowledged that upon completion of the school construction program, coupled with a feeder plan based on reconstituted zone lines for the K-5 schools so as to obtain the greatest amount of desegregation possible, the schools of Waterbury would have been satisfactorily desegregated.

The Consent Order also provided, in pertinent part, that the defendants would develop a student assignment plan which would achieve the greatest amount of desegregation possible, considering the practicalities, and which would be implemented in such a manner that the burden of desegregation would not fall more heavily upon students of one race or national origin than upon students of another race or national origin. A set of guidelines for the development of such a plan, known as Attachment A, was annexed to the Consent Order. The Consent Order made clear that the defendants were committed only to the concepts contained within Attachment A, and were free to develop an equally effective

plan.

With regard to the West End Middle School District, Attachment A recommended that Croft School be used as a K-5 school. This facility would serve students who were then in the zones served by Barnard, Maloney and Duggan Schools. Attachment A recommended that Croft be used temporarily until a new facility could be built or, through extensive remodeling, as a permanent location for the K-5 school. Under this plan, one-third of the students at Russell School would also attend Croft. Duggan would be retained as a center for retarded children, but Barnard, Russell, and Maloney Schools would be closed entirely.

On January 15, 1974, the deadline for the submission of alternate plans pursuant to the Consent Order; the Board of Education of Waterbury submitted its Plan H. Plan H would have closed Croft School, retaining Barnard and Duggan as K-5 schools. Maloney School would be closed under this plan, with its students being bused to Barnard, Duggan and Hopeville Schools. The Plan also effected the Bunker Hill, Driggs, Russell, Tinker and Walsh School Districts.

In 1975, the South End Education Committee, an "unincorporated organization of Puerto Rican parents and community leaders" and sixteen individual Hispanic parents sought to intervene in this action, claiming that Plan H, by closing Maloney but retaining Barnard and Duggan, placed the burden of desegregation more heavily on minorities in the West End of the City of Waterbury.

Intervenor status was granted on May 6, 1975. After extensive hearings on Plan H, the Court, Murphy J., sustained the Intervenor's position and enjoined the defendants from implementing that portion of Plan H which would have transferred K-5 children from the Maloney District to some other school.

Maloney School is located at 233 South Elm Street in downtown Waterbury. It was built in 1889, with additions in 1914 and 1924. The school with the largest number of Hispanic children in the City, it had an October 1, 1976, population of 243. Of this number, 4 were Black, 28 White, and 211 Hispanic. Although distinguished by the presence of carpeting, it is the oldest school facility in service in the City. The location of the school in close proximity to one of Waterbury's two ambulance services results in regular interruptions by wailing sirens. The school has been plagued by fires, the odor of which can still be detected. The school has been slated for demolition under the Use Plan of the South End Urban Renewal Area.

Duggan School is located at 932 Bank Street in Waterbury. Built in 1890, with additions in 1908 and 1918, it had an October 1, 1976, population of 82 Whites, 40 Hispanics, 9 Blacks and 3 American Indian students. In addition, Duggan houses several Special Education classes, with a population of 43 students. Of this number, 16 are White, and 27 Black. Duggan also has a swimming pool, a factor which had led some to conclude that it is a more attractive facility than either Maloney or Barnard.

Barnard School is located at 11 Draher Street in Waterbury. It was built in 1898, with an addition constructed in 1928. As of October 1, 1976, there were 192 Whites, 18 Blacks, 17 Hispanics and 1 Asian student at Barnard for a total of 228. Barnard is truly a neighborhood school. Many of its parents moved to and/or have remained in the neighborhood because of the school, and many of them are Barnard alumni. The school's current principal, Norman Fietelson, in fact served as a teacher at Barnard to several of the parents of today's students. The parents feel an exceptional closeness to the school as an institution and have warm praise for its staff.

Following the Court's rejection of the West End portion of Plan H, a number of alternative plans were submitted. The Board of Education proposed busing only Maloney's fourth and fifth graders to Barnard and/or Duggan or, in the alternative, leaving the Maloney District unchanged but making significant capital improvements there. The United States objected, and proposed a cluster plan for the three schools. Then, on February 11, 1977, the Government submitted the Buford Plan, which, after discussing and rejecting three other alternatives, recommended the closing of Barnard and the reassignment of its students to Maloney and Duggan. The Board of Education's response, an open enrollment plan for the three-school district, was vehemently opposed by the Government and the intervenors.

Suddenly faced with the possible closing of their school,

and perceiving that the Board of Education could not effectively represent their interests, the parents of students at Barnard School sought legal counsel.

The Barnard School PTA, Inc., is a nonprofit, nonstock corporation organized under the laws of the State of Connecticut. Its purpose is "To attempt to preserve Barnard School, Waterbury, Connecticut, as a neighborhood school, to raise funds for that purpose and to engage in any lawful act or activity for which corporations may be formed . . ." In response to the submissions of the Buford Plan by the Government, Barnard School PTA, Inc., authorized its attorneys to attempt to intervene in this action in an effort to prevent the closing of the school. A hearing was held on the "Motion To Intervene As A Defendant Or For Permission To Appear As Amicus Curiae" on March 7, 1977. On March 8, 1977, United States Magistrate Arthur H. Latimer denied the Motion to Intervene but granted the Barnard School PTA, Inc.'s alternative request to participate as amicus curiae and permitted it both to participate in oral argument on the existing desegregation proposals and to offer other recommendations.

On March 24, 1977, seventy (70) parents of Barnard students, in depositions taken either directly or by stipulation, testified about their feelings and their children's feelings toward Barnard School and its staff. Many of the deponents had attended Barnard themselves as children, and had either moved to or remained in the neighborhood so that their children would attend it as well. All of the parents reported their children's favorable reactions to

the school, its location and its teachers. The parents themselves shared these attitudes. None of the parents deposed had any objection to their children attending school with Hispanic children. On the contrary, many were aware of or had been involved in a "Green Circle" program designed to welcome the Hispanic children whose arrival had been expected under Plan H. All the parents, however, objected to having their children bused to Maloney School, citing both conditions at Maloney and quality of staff, school and environment at Barnard. On the other hand, most of the parents would not object to having their children bused to a new K-5 facility in a safer area which would serve the entire Maloney, Duggan, and Barnard District. Faced with the prospect of forced busing to Maloney, however, many of the parents, despite the costs, would enroll their children in parochial or private schools, or even move from the neighborhood or City.

In addition to establishing its interests in preserving Barnard as a neighborhood school, the Barnard School PTA, Inc., as a friend of the Court, submitted for the consideration of the Court and the parties three alternative proposals designed to effectively and equitably desegregate the West End K-5 schools while providing quality education, preserving neighborhood stability and making good use of existing educational facilities. Those plans can be briefly summarized as follows:

Amicus Plan A - Voluntary majority to minority transfers.

Under such a plan, students who are members of a majority racial, or ethnic group at either Barnard, Maloney or Duggan Schools would be allowed to transfer to any of the other two schools provided

that they would be members of a minority racial or ethnic group in the school to which they transferred.

Amicus Plan B - Notice Plan. Under this plan, the parents of children attending Barnard and Duggan would be formally notified that their children would be bused to Maloney unless they made timely objection. Only the children of those who failed to object would be bused; the others would remain at their respective schools.

Amicus Plan C - Majority to minority transfer with busing of certain Duggan students. Under this plan, none of the three schools would be closed. Forty-three Special Education students (16 Black and 27 White) would remain at Duggan. The 3 Indian 9 Black and 40 Hispanic students in Duggan's regular education program would be bused (or in some cases would walk) to Barnard. The 82 White students would be bused to Maloney. Voluntary majority to minority transfers would desegregate the three schools even further, but at minimum, the following enrollments would result:

DUGGAN SCHOOL

Black	16	37%
White	27	63%
	<u>43</u>	<u>100%</u>

MALONEY SCHOOL

Black	4	1%
White	110	34%
Hispanic	211	65%
	<u>325</u>	<u>100%</u>

BARNARD SCHOOL

Asian	1	1%
American Indian	3	1%
Black	27	10%
Hispanic	57	20%
White	192	68%
	<u>280</u>	<u>100%</u>

Following a hearing held on April 18, 1977, U. S. Magistrate Latimer filed a Ruling on Remedial Plans, dated April 28, 1977. Under the terms of this Ruling, the effectiveness of voluntary Single District Plan covering Barnard, Duggan and Maloney schools was to be tested by the defendants. Should that plan fail to bring about a satisfactory degree of desegregation, however, Amicus Plan C was to go into effect immediately.

On May 16, 1977, a hearing was held before Hon. Thomas Murphy in Waterbury. At that hearing, Judge Murphy ordered the test of the voluntary plan, and a schedule for mailing notices of the plan to parents and reporting the results to the Court was established.

On June 9, 1977, the defendants filed Plan Z, proposing that twenty-five volunteers of Hispanic ancestry be bused from Maloney to Barnard, that seventy-five Barnard children living the furthest distance from Barnard be bused to Maloney, and that the Board of Education review and modify Duggan and Barnard district lines to achieve the greatest degree of racial balance.

A final hearing in this case was held on June 10, 1977, before Judge Murphy. The results of the mailing proposing a voluntary Single District Plan were reported to the Court. On that same date, the Court entered an Order approving and concurring in Magistrate Latimer's Ruling on Remedial Plans and ordering the implementation of Amicus Plan C. The defendants were ordered to make preparations at once to have such a plan fully operational by September 7, 1977.

On July 21, 1977, a Notice of Appeal from Judge Murphy's Order Implementing Amicus Plan C was filed by the defendants. A Motion to Intervene as Appellee filed by Barnard School PTA, Inc., amicus curiae below, was granted by this Court on August 24, 1977.

ARGUMENT

- I. BECAUSE THE DEFENDANTS ENTERED INTO A CONSENT ORDER WHICH RENDERED UNNECESSARY A CONSIDERATION OF THE ISSUE OF THE DEFENDANTS' PURPOSE AND INTENT TO DISCRIMINATE, THE COURT PROPERLY DID NOT DECIDE THAT ISSUE IN EVALUATING THE DEFENDANTS' PROPOSED DESEGREGATION PLAN.

On June 8, 1973, the plaintiff and defendants entered into a Consent Order which provided, inter alia, that the defendants would undertake certain actions which, upon their successful completion, would result in the Waterbury School Systems being "satisfactorily desegregated." (Consent Order, June 8, 1973, p. 4) The defendants, by the Consent Order, "committed (themselves) to the implementation of the concepts contained in Attachment A, hereto or an equally effective plan." (Consent Order, p. 4)

The defendants continued to deny "that they have discriminated against any person on the basis of race or national origin in the operation of the Waterbury School System." (Consent Order, p. 4) However, by signing the Consent Order, they specifically waived their right to litigate that and other previously disputed issues in the case. "The parties agree, however, that entry of the following Order will resolve the remaining issues in this case and make a trial unnecessary." (Consent Order, p. 4)

The appellants, at page 11 of their Brief, concede that by signing the Consent Order they "agreed to do certain things and to achieve a desegregated school system." They now appear to claim,

however, that the key wording of the Consent Order, "[t]he plan shall achieve the greatest amount of desegregation possible, considering the practicalities, and shall be implemented in such a manner that the burden of desegregation does not fall more heavily upon students of one race or national origin than upon students of another race or national origin," is so ambiguous as to render substantial compliance impossible without considerable modification. Appellants do not clearly specify, however, how this alleged ambiguity may be related to their essential claim that the Court failed to consider the issue of the defendants' purpose or intent to segregate.

At bottom, the appellants' arguments amount to nothing more than an attempt to circumvent the obligations which they voluntarily undertook as signatories to the Consent Order. The Consent Order, which was the result of lengthy negotiation between the parties thereto, stands on its own and is the controlling law in this case. Conclusions of law or fact which the Court might have made had the case gone to trial are not relevant to a determination of whether or not there has been substantial compliance with the Consent Order itself.

"Consent decrees are entered into by parties to a case after careful negotiation has produced agreement on their precise terms. The parties waive their right to litigate the issues involved in the case and thus save themselves the time, expense, and inevitable risk of litigation. Naturally, the agreement reached normally embodies a compromise; in exchange for the saving

of cost and elimination of risk, the parties each give up something they might have won had they proceeded with the litigation."

United States v. Armour and Co., 402 U. S. 673, 681 (1971).

Neither of the parties to the Consent Order, nor the Court itself, has the power to alter unilaterally the terms of the Consent Order. See, Hart, Schaffner and Marx v. Alexander's Dept. Stores, Inc., 341 F. 2d 101 (2nd Cir. 1965); Artvale, Inc. v. Rugby Fabrics Corp., 303 F. 2d 283, 284 (2nd Cir. 1962). Thus, the Court properly concluded that in evaluating the defendants' school desegregation plans, it did not have to decide whether the defendants had a purpose and intent to segregate elementary school children, because a decision on that issue had been rendered unnecessary by the Consent Order.

III. THE COURT DID NOT ERR IN ORDERING THE IMPLEMENTATION OF AMICUS PLAN C.

Although appellants argue that both the Special Master's report and the record in general demonstrate "extensive attempts to comply with the Consent Decree", no such progress had been demonstrated with respect to the desegregation of Barnard, Duggan and Maloney schools. On the contrary, the Special Master's report noted that with regard to the desegregation of these three schools, "the situation presented certainly verges on default..." (Ruling on Remedial Plans, April 28, 1977, p. 16). While reluctant to take on a responsibility which, by the terms of the Consent Order, belonged to the appellants, the Special Master noted that "as

forthrightly conceded by counsel for defendants at oral argument, this case has been pending far too long to permit the risk of another lost school year posed by simply leaving defendants to consider backup plans for the first time at summer's outset..." (Ruling, supra, p. 15) The report of the Special Master, to which appellants have not taken exception, see Fed. R. Civ. P. 53 (e) (2), therefore concluded that it was essential to adopt a reserve plan immediately. The Special Master found that Amicus Plan C was the most sensible backup plan among all the alternatives examine.

Although skeptical of appellants' ability to devise a satisfactory alternative at such a late date, the Special Master did not preclude them from coming forward with such an alternative.

For defendants to start up a contingency plan from scratch even now is probably too late, i.e., would probably lead to yet another school year lost, unless such a fresh proposal was so patently and literally "equally effective" a desegregation method as any proposal before the Court, and as even-handed, that it would require no test by discovery or extended evidentiary hearing, and its merits could be satisfactorily demonstrated to and reviewed by the responsible Judge simultaneously with his hearing of and action on any oral argument in the near future on the undersigned's instant report as Special Master. (Ruling, supra, p. 16)

The Special Master's Report thus ordered an initial test of a voluntary Single District Plan with Amicus Plan C to go into effect if the voluntary plan proved unsatisfactory. In addition,

"any final plan suggestions from defendants, and any further briefs addressed to this report and attendant requests for its adoption, modification or rejection, are to be (1) discussed orally among all counsel prior to the argument hearing, and (2) furnished to Sylvester A. Markowski, Clerk of the Court, at New Haven, Connecticut no later than May 11, 1977 for inclusion with his delivery of pertinent file documents to the reviewing Judge." (Ruling, supra, p. 19)

No additional plans were discussed among counsel or presented to the Clerk prior to May 11, 1977. On June 10, 1977, however, the date of the final hearing in this case before Judge Murphy, appellants presented their Plan Z. Not only was submission of this plan not in compliance with the Special Master's scheduling order, but it was also, as appellants concede at page 14 of their Brief, "a last-minute entry and not supported with detail as it ought to have been." Surely, the appellants had ample opportunity to devise Plan Z and submit it to the Court and the parties in accordance with the time schedule set by the Special Master. Thus, their request that this action be returned to the District Court for further evaluation of Plan Z is totally without merit.

The District Court ordered the implementation of Amicus Plan C following a finding by the Special Master that it was the best backup plan in the event that the voluntary Single District Plan failed to bring about a satisfactory degree of desegregation. No objections to the Special Master's Report were filed by the Appellant pursuant to Fed. R. Civ. P. 53 (e) (2), nor are the Special Master's Findings specifically attacked on appeal. "Where the master's findings of fact are confirmed and adopted by the District Court

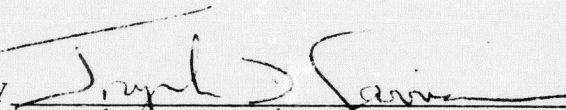
an Appellate Court will normally accept them." Moore' Manual, Federal Practice and Procedure, §21.01[14]; In Re Gurinsky, 192 F. 2d 296, 17 F. R. Serv. 53.21, Case 1 (2nd Cir. 1952). Since the Special Master's conclusions are not "clearly erroneous", the District Court acted properly in ordering the implementation of Amicus Plan C.

CONCLUSION

For all of the above reasons the Order of the District Court should be affirmed.

RESPECTFULLY SUBMITTED

By

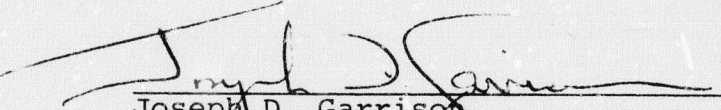

Joseph D. Garrison
Attorney for the Intervening Appellee

By


Jonathan E. Silbert
Attorney for the Intervening Appellee
Garrison, Kahn, Wies, Crane & Silbert
405 Orange Street
New Haven, Connecticut 06511

CERTIFICATION

This is to certify that a copy of the foregoing was mailed this 25th day of August, 1977 to Michael J. Daly III, Esq., 50 Holmes Avenue, Waterbury, Connecticut; Carl R. Cicchetti, Esq., 236 Grand Street, Waterbury, Connecticut; Ken Kimmerling, Esq., Puerto Rican Legal Defense Fund, 95 Madison Avenue, New York, New York, 10016; Alice Bussiere, Esq., New Haven Legal Assistance Association, 413 Howard Avenue, New Haven, Connecticut, 06519; Joe Montwell, Esq., Waterbury Legal Aid & Reference Service, 61 Field Street, Waterbury, Connecticut, 06702; and Leigh Manasevit, Esq., Education Section, Civil Rights Division, United States Department of Justice, Washington, D. C. 20530.


Joseph D. Garrison

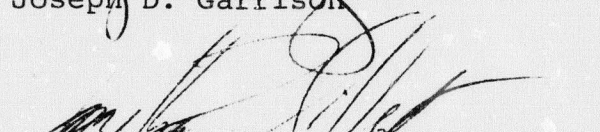

Jonathan E. Silbert

TABLE OF AUTHORITIES

<u>CASES CITED:</u>	<u>PAGE</u>
Artvale, Inc. v. Rugby Fabrics Corp., 303 F.2d 283, 284 (2nd Cir. 1962).....	13
Hart Schaffner and Marx v. Alexander's Dept. Stores, Inc., 341 F.2d 101 (2nd Cir. 1965).....	13
In Re Gurinsky, 192 F.2d 296, 17 F. R. Serv. 53.21, Case 1 (2nd Cir. 1952).....	16
United States v. Armour and Co., 402 U.S. 673, 681 (1971).....	12, 13
 <u>STATUTES CITED:</u>	
42 U.S.C. 2000c-6.....	2
28 U.S.C. 1345.....	2
 <u>RULES CITED:</u>	
Fed. R. Civ. P. 53(e)(2).....	14, 15
 <u>OTHER SOURCES CITED:</u>	
Moore's Manual, Federal Practice and Procedure, §21.01[14].....	15, 16